The Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-339 OF 2010
SURIYADI JEFFREY TAN AND ABDUL WAHAB PATAIL JJCA
17 JANUARY 2012

Civil Procedure — Jurisdiction — High Court — High Court sitting as land reference court with assessors awarded appellant additional compensation — Whether subsequently judge sitting without assessors could amend quantum of award — Whether judge alone lacked jurisdiction to decide matters affecting compensation — Whether respondent's application to clarify/amend award after lodging appeal to Court of Appeal duplicated appeal process and abused process of court — Whether abuse to invoke O 92 r 4 of the Rules of the High Court 1980 to amend award when legislation provided for proper appeal procedure

In a land reference matter, the High Court, sitting with assessors, had made an order ('the first order') that the respondent pay the appellant additional compensation of RM539,425.25 and 50% of the late payment charges thereon with interest. The quantum awarded was a unanimous decision of the assessors with which the judge had concurred. Dissatisfied with the quantum, the respondent filed an appeal against that decision to the Court of Appeal. About the same time, and without disclosing that the appeal had been filed, the respondent applied (vide encl 9) to purportedly clarify and if necessary amend the compensation amount stated in the first order. Enclosure 9 was filed pursuant to Order 92 r 4 of the Rules of the High Court 1980 ('RHC') and sought to invoke the inherent jurisdiction of the court to make any order as was necessary to prevent injustice or an abuse of process of the court. The High Court judge, this time sitting alone without assessors, allowed encl 9 and ordered ('the second order') the compensation sum stated in the first order to be altered to RM340,468.22. The appellant filed the instant appeal to set aside the second order contending that it had been obtained by duplicity of proceedings and an abuse of process of court and prayed for the quantum awarded in the first order to be restored.

Held, allowing the appeal with costs and setting aside the second order:

(1) Not only was the second order wrongly obtained, the judge had no jurisdiction to issue it. In the light of ss 40D(3) and 49 of the Land Acquisition Act 1960, the matter was to be dealt with by the land reference court (see para 19).

(2) Since the issue before the court addressed the amount of compensation,

the judge sitting alone did not have the jurisdiction to decide. He could not amend the first order in respect of a land reference heard with the aid of assessors. The compensation awarded in the first order was a unanimous decision with which the judge had concurred (see paras 15 & 18).

(3) On matters affecting compensation a judge sitting alone had no jurisdiction. That no objection was raised or that it was a 'recomputation' could not vest the judge with jurisdiction (see para 18).

(4) Since the respondent had filed a notice of appeal to the Court of Appeal earlier, the application in encl 9 was in duplicity of the appeal process. There was no evidence the appeal was withdrawn. The alternative of making an application to clarify the order appealed from having been forgone remained forgone. The document that created the duplicity had to fall. There could not be a question of the party committing a duplicity being at liberty to choose which one was to be proceeded with without having first withdrawn the other (see para 12).

(5) The inherent powers under O 92 r 4 of the RHC pertained to those instances where there was no provision in the rules and there arose a need to consider what inherent power the court had to prevent an injustice. Since the relevant legislation provided a specific provision for appeals from the land reference court, the question of resort to any inherent power to prevent injustice under the RHC did not arise (see para 13).

(6) The respondent's application was couched or disguised as seeking clarification and if necessary to amend the order so as to clarify its terms. What was sought and obtained was well beyond the scope of clarification. It was a substantive amendment of the first order in terms of the second order (see para 14).

[Bahasa Malaysia summary

Dalam perkara rujukan tanah, Mahkamah Tinggi, yang bersidang dengan penaksir-penaksir, telah membuat perintah ('perintah pertama') bahawa responden membayar perayu pampasan tambahan sejumlah RM539,425.25 dan 50% daripada caj bayaran lewat dengan faedah. Kuantum yang diawardkan adalah keputusan penaksir-penaksir yang mana telah dipersetujui oleh hakim. Berasa tidak puas hati dengan kuantum itu, responden telah memfailkan rayuan terhadap keputusan Mahkamah Rayuan. Pada masa sama, dan tanpa mendedahkan bahawa rayuan telah difailkan, responden memohon (melalui lampiran 9) bertujuan menjelaskan dan jika perlu meminda jumlah pampasan yang dinyatakan dalam perintah pertama. Lampiran 9 telah difailkan menurut A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan memohon untuk menggunakan bidang kuasa sedia ada mahkamah untuk membuat apa-apa perintah yang perlu bagi mengelakkan ketidakadilan atau penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi, pada masa ini

bersidang seorang sahaja tanpa penaksir-penaksir tersebut, telah membenarkan lampiran 9 dan memerintahkan ('perintah kedua') jumlah pampasan yang dinyatakan dalam perintah pertama diubah kepada RM340,468.22. Perayu telah memfailkan rayuan ini untuk mengetepikan perintah kedua dengan berhujah bahawa ia telah diperoleh melalui prosiding yang bertindan dan proses mahkamah telah disalahgunakan dan memohon kuantum yang diawardkan dalam perintah pertama dikekalkan.

Diputuskan, sebulat suara membenarkan rayuan dengan kos dan mengetepikan perintah kedua:

(1) Perintah kedua itu bukan sahaja telah diperoleh secara salah bahkan hakim tiada bidang kuasa untuk mengeluarkannya. Berdasarkan ss 40D(3) dan 49 Akta Pengambilan Tanah 1960, perkara itu hendaklah dikendalikan oleh mahkamah rujukan tanah (lihat perenggan 19).

(2) Oleh kerana isu di hadapan mahkamah mengemukakan jumlah pampasan, hakim yang bersidang seorang tiada bidang kuasa untuk membuat keputusan. Beliau tidak boleh meminda perintah pertama berkaitan rujukan tanah yang telah didengar dengan bantuan penaksir-penaksir itu. Pampasan yang diawardkan dalam perintah pertama adalah keputusan sebulat suara yang mana telah dipersetujui oleh hakim (lihat perenggan 15 & 18).

(3) Berhubung perkara-perkara berkaitan pampasan, hakim yang bersidang seorang tiada bidang kuasa. Tiada bantahan ditimbulkan atau ia adalah 'recomputation' yang tidak boleh memberikan hakim bidang kuasa itu (lihat perenggan 18).

(4) Oleh kerana responden telah memfailkan notis rayuan kepada Mahkamah Rayuan sebelum itu, permohonan dalam lampiran 9 merupakan dua proses rayuan yang sama. Tiada keterangan yang rayuan itu telah ditarik balik. Cara alternatif dengan membuat permohonan untuk menjelaskan perintah yang dirayu daripada terlepas peluang tidak berhasil. Dokumen yang dibuat merupakan dokumen yang sama dan tiada kesan. Tiada persoalan tentang pihak yang melakukan kependuaan itu bebas memilih yang mana hendak diteruskan tanpa menarik balik yang satu lagi (lihat perenggan 12).

(5) Kuasa sedia ada di bawah A 92 k 4 KMT berhubung perkara itu di mana tiada peruntukan dalam kaedah dan timbul keperluan mempertimbangkan apakah kuasa sedia ada mahkamah adalah wajar untuk mengelakkan ketidakadilan. Oleh kerana perundangan relevan memperuntukkan peruntukan spesifik untuk rayuan daripada mahkamah rujukan tanah, persoalan untuk menggunakan apa-apa kuasa sedia ada bagi mengelakkan ketidakadilan di bawah KMT tidak timbul (lihat perenggan 13).

(6) Permohonan responden telah dilihat atau disamar sebagai meminta penjelasan dan jika perlu meminda perintah itu agar dapat menjelaskan terma-termanya. Apa yang dipohon dan diperoleh melampaui skop penjelasan. Ia merupakan pindaan substantif kepada perintah pertama mengikut terma-terma perintah kedua (lihat perenggan 14).]

Notes

For cases on High Court jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4935–5007.

Legislation referred to

Land Acquisition Act 1960 ss 40A, 40D, 40D(3), 49
Rules of the High Court 1980 O 92 r 4

Appeal from: Land Reference No S7–15–7 of 2005 (High Court, Kuala Lumpur)

Rosli Dahlan (Nadia Marni with him) (Hishammuddin Allen & Gledhill) for the appelant.
Narkunavathy Sundareson (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] This was an appeal from the decision of the learned judicial commissioner on 29 April 2010 ('the second order') to allow an application by the Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur, the respondent herein, to clarify and if necessary make consequential amendment to a High Court decision delivered on 12 January 2010 ('the first order') in respect of compensation payable.

[2] In dealing with land reference matters under the Land Acquisition Act 1960, the High Court is governed by the special provisions herein. Although in substance it is the High Court, we would refer to it as the land reference court due to the special provisions applicable when the High Court sits with the assistance of assessors in a land reference matter.

THE FIRST ORDER

[3] The first order on 12 January 2010 required the respondent to pay to the appellant:

(a) additional compensation amounting to RM539,425.25; and

(b) 50% of the late payment charges on the additional compensation at 8%pa from 15 November 1989 to date of full settlement.

[4] The respondent filed an appeal against the first order on 2 March 2010.

THE SECOND ORDER

[5] On 29 April 2010, the learned judicial commissioner, sitting alone, upon an application (encl 9) by the respondent filed in March 2010 and fixed for hearing 15 March 2010, allowed the application and made a new order which altered the first order as follows:

(a) the respondent to pay the first applicant an additional compensation of RM340,468.22 only; and

(b) the respondent to pay 50% of late payment charge at 8%pa on RM340,468.22 from the date of Borang K (15 November 1989) to date of full settlement.

[6] The appellant appealed against this second order.

GROUNDS OF APPEAL

[7] The grounds of appeal pursued before us were:

(a) duplicity of proceedings and abuse of process;

(b) the appellant as holder of reversionary rights is entitled to receive the full compensation of RM539,425.50; and

(c) the appellant is entitled to compensation for injurious affection.

THE ENCLOSURE 9 APPLICATION

[8] The respondent's application in encl 9 was filed on March 2010 and fixed to be heard on 15 March 2010. By it the respondent sought the following orders:

(a) Bahawa pihak-pihak dibenarkan hadir bagi menjelaskan (clarity) award mahkamah yang diberi pada 12.1.2010 berhubung dengan pampasan tambahan kepada Pemohon Pertama bagi tanah pajakan sublot III dan sublot VI;

(b) Bahawa sekiranya perlu, meminda/ mengetepikan perintah tersebut; dan

(c) Bahawa kos permohonan ini ditanggung oleh pihak masing-masing.

[9] The reasons given therein were:

(a) Bahawa pembahagian pampasan tambahan bagi tanah pajakan kelihatan tidak konsisten dengan pembahagian pampasan yang telah ditentukan oleh Pentadbir Tanah, iaitu 27/80 dan 34/80 masing-masing;

(b) Bahawa sekiranya pembahagian pampasan tambahan bagi tanah pajakan seperti yang diputuskan oleh Mahkamah dikekalkan, ia akan mengakibatkan suatu keadaan yang janggal di mana bahagian pemegang pajakan adalah kurang daripada awad yang diberi kepada Pentadbir Tanah; dan

(c) Dalam semua hal keadaan kes perkiraan pampasan tambahan perlu disemak semula dan diperjelaskan dan sekiranya perlu, diketepikan / dipinda demi kepentingan keadilan.

[10] The application in encl 9 made under O 92 r 4 of the Rules of the High Court 1980 was supported with an affidavit from one Alice Loke Yee Ching affirmed on 4 March 2010 who deposed:

7 Pada 1.3.2010, pihak Jabatan Penilaian dan Pengurusan Harta, Dewan Bandaraya Kuala Lumpur telah menulis surat kepada pejabat saya untuk memohon penjelasan berkaitan dengan keputusan mahkamah bertarikh 12.1.2010, khususnya berhubung dengan pampasan tambahan bagi tanah pajakan. Surat tersebut kini dikemukakan dan dieksibitkan sebagai 'ALYC-1'.

8 Saya sesungguhnya menyatakan bahawa setelah meneliti isu yang dibangkitkan dalam surat tersebut, perkiraan berhubung tanah pajakan perlu disemak semula kerana:

(a) sekiranya pampasan tambahan kepada Pemohon Pertama bagi tanah pajakan adalah RM 54 sekaki persegi, pemegang pajakan hanya menerima RM 36 sekaki persegi sahaja. Perkiraan ini kelihatan bertentangan dengan awad Pentadbir Tanah yang telah memutuskan bahagian pemegang pajakan adalah RM 53 sekaki persegi bagi sublot III. Ini telah mewujudkan suatu keadaan yang janggal;

(b) bagi tanah pajakan sublot III dan sublot VI, Pentadbir Tanah telah mengawadkan RM 27 dan RM 34 kepada Pemohon Pertama masing-masing. Akan tetapi dengan kenaikan nilai tanah ke RM 54 sekaki persegi kepada Pemohon Pertama bagi kedua-dua tanah pajakan, perkiraan mahkamah seolah-olah tidak mengambilkira kadar yang berbeza dalam awad Pentadbir Tanah.

(c) pembahagian award oleh Pentadbir Tanah bagi tuan tanah dan pemegang pajakan tidak dipertikaikan dalam kes ini berpandukan Notis Bantahan yang difailkan oleh Pemohon Pertama. Oleh yang demikian, pembahagian bagi pampasan tambahan seharusnya konsisten dengan pembahagian yang ditentukan oleh Pentadbir Tanah, iaitu 27/80 dan 34/80 bagi sublot III dan VI masing-masing.

9 Saya sesungguhnya menyatakan bahawa berdasarkan kepada alasan yang dinyatakan di atas, adalah perlu untuk pihak-pihak hadir bagi menjelaskan (clarify) perkiraan pampasan tambahan kepada Pemohon Pertama berhubung tanah pajakan, dan sekiranya perlu, mengetepikan/meminda perkiraan tersebut.

10 Saya sesungguhnya menyatakan mahkamah yang mulia ini mempunyai bidangkuasa sedia ada (inherent) untuk mengetepikan/meminda perkiraan awad sekiranya didapati ia perlu dikira semula untuk mengelak daripada berlaku suatu ketidakadilan kepada pihak-pihak dalam kes ini.

[11] Order 92 r 4 of the Rules of the High Court 1980 pertains to the preservation of the inherent powers of the court and the said rule declares that for the removal of doubts nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[12] In the ordinary case, if a court erred, the proper course is an appeal. Since a notice of appeal to the Court of Appeal had been filed earlier, the application in encl 9 is in duplicity of the appeal process. Until an appeal is withdrawn, dismissed or otherwise disposed off by the court to which it is filed, it remains in existence as an appeal. No evidence was put before the court that the appeal was withdrawn. The alternative of making an application to clarify the order appealed from having been forgone, remained foregone. The filing of the application at encl 9 before the High Court created a duplicity. The document that created the duplicity must fall. There cannot be a question of the party committing a duplicity being at liberty to choose which is to be proceeded with without having first withdrawn the other.

[13] The inherent powers reserved under O 92 r 4 pertain to those instances where no provision is provided in the rules, and there arises a need to consider what inherent power the court may have to prevent an injustice. In that context, O 92 r 4 offers the clarification that nothing in the rules is to be interpreted to limit the power of the court to prevent injustice or to prevent an abuse of the process of the court. Since the relevant legislation has provided a specific provision in respect of appeals from the land reference court, the question of resort to any inherent power to prevent injustice under the Rules of the High Court 1980 does not arise.

[14] The alternative ground to prevent an abuse of the process of the court also does not arise. On this subject we observe that nowhere in the affidavit affirmed on 4 March 2010 in support of encl 9 was it disclosed that a notice of appeal had been filed by the respondent two days earlier on 2 March 2010. The deponent of the said affidavit was none other than the same counsel who appeared before the learned judicial commissioner in the first order. Instead, the course adopted by the respondent was an application couched or disguised

in terms of seeking clarification and if necessary to amend the order, but instead seeking to amend the first order so as to clarify its terms. What was sought and obtained was well beyond the scope of clarification to a substantive amendment of the first order to the terms in the second order.

[15] We further observe that the learned judicial commissioner did not sit with the assistance of any assessor in making the second order when he amended the first order which was made with the assistance of assessors. The notes of evidence recorded in respect of the first order a unanimous decision with which the learned judicial commissioner concurred.

[16] Section 40A of the Land Acquisition Act 1960 provides that with regard to the amount of compensation, the judge shall be assisted by assessors to assist him.

[17] Section 40D provides:

> (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

[18] Since the issue addresses the amount of compensation, the learned judicial commissioner sitting alone does not have jurisdiction to decide. He cannot therefore amend the first order in respect of a land reference heard with the aid of assessors. The land reference court is a creature of statute under the Land Acquisition Act 1960. On matters affecting compensation a judge sitting alone has no jurisdiction. That no objection was raised, or that it was a 'recomputation' cannot vest the learned judicial commissioner with jurisdiction.

[19] Both are fundamental errors. Not only was the second order wrongly obtained, the learned judicial commissioner had no jurisdiction to issue it. In light of ss 40D(3) and 49, the matter is to be dealt with by the land reference court.

[20] In the event, appeal must be allowed and the second order made by the learned judicial commissioner must be set aside.

[21] We, therefore, allowed the appeal with costs and set aside the order of the learned judicial commissioner.

Appeal allowed with costs and second order set aside.

Reported by Ashok Kumar